2. Assuming then, that the same rule, whatever it be, should apply to grantor as to grantee, the question is, what kind of a way by necessity would a grantee of an entirely surrounded lot take; would it be limited to the uses for which the land was used at the time of the grant, or would it extend to any use to which the land was legitimately adapted? The analogies of the law seem to point in the latter direction. It is clear that if a way be created by an *express grant*, not positively limited in its terms, the grantee takes a general right, not limited to any prior or contemporaneous use; but he may use the way for any purpose for which he may use the land to which the way leads. Indeed, this is now the modern doctrine in England. See *Finch* v. *Great Western Railway Co.*, 28 Weekly Rep. 229; 19 Am. Law Reg. N. S. 470, and cases cited in note.

If this be so in express grants, why not in implied grants? Why should a grantee of land, entirely surrounded by other land of his grantor, be restricted to a way only for that purpose for which the grantor had formerly used the premises, or that for which he began to use it himself, immediately after the grant? As a general rule, a grantee of land is entitled by implied grant to any easement in the adjoining land of the grantor, which is necessary to render the land granted capable of enjoyment *to the full extent*: Goddard on Easements (Am. ed.) p. 109. It is a presumed intention of the parties that the grantee should have the means of using the thing granted, and therefore that he should have all rights and powers in or over the grantor's soil which may be requisite for that purpose.

If a grantor wishes to restrict his grantee to a right of way for some particular purpose only, it is easy for him to insert such restriction in his conveyance, when of course the restriction would be valid, (even if otherwise the grantee might have taken a larger way by implication), on the familiar ground that *expressum facit cessare tacitum*. And in the absence of any such restriction, it seems reasonable to hold that the implied right extends to any use to which the land is adapted, in *its then condition*, whether formerly so used or not; but, perhaps, not to a right to use the land in a substantially altered or changed condition, as if it be converted from woodland, or agricultural land, into sites for dwellings or manufacturing purposes. This seems to bring the implied grant by necessity into harmony with the implied grant arising from prescriptive use. See *Parks* v. *Bishop*, 120 Mass. 341, as to the extent, and *Atwater* v. *Bodfish*, 11 Gray 150, as to the restriction of a prescriptive way.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of Nebraska.

COTTON *v.* GREGORY ET AL.

Where a deed, deposited as an escrow, was to be delivered by the depositaries, when they should receive a good and sufficient warranty deed of certain property for the grantor, and the referee found that "plaintiff was never given or tendered any conveyance, sufficient or otherwise" of the property: *Held*, that this finding of the referee was immaterial, inasmuch as the receipt of such conveyance by the depositaries was all that was required by the condition of the deposit.

The rule that a fraudulent delivery by or procurement from the depositary, of a

deed, deposited in escrow, will not operate to pass the title, even in favor of a subsequent purchaser in good faith, without notice, will not be carried to the extent of enabling the grantor to recognise the grantee's possession of the instrument as valid for some purposes, and to disclaim it as nugatory for all others, especially when to do so would result in an injury to an innocent party.

APPEAL from Lancaster county.

John S. Gregory, in personam

Lamb, Billingsley & Lambertson, for appellee.

The facts are sufficiently stated by the court.

LAKE, J.—None of the evidence on which the referee based his findings of fact is before us, but, as no question is made as to its sufficiency to support them, they must be taken as conclusive between the parties. The only subject of present inquiry, therefore, is whether in view of the facts so found, the referee's conclusions of law, and the decree of the District Court thereon, can be sustained.

There can be no doubt, from the facts found by the referee, that the confidence reposed by the plaintiff in McMurtry & Gregory was much abused by them, in dealing with the property intrusted to their management, in a manner neither contemplated nor warranted by the arrangement between them. But this fact must not lead to the violation of well established rules of law, in redressing the wrong done.

The third fact reported by the referee is that the consideration of the escrow was that said deed was to be delivered to the said E. Mary Gregory, grantee, only when good and sufficient warranty-deed of a one-sixteenth interest of and to the Buchanan Silver Mine, of Georgetown, Colorado, should be received by said McMurtry & Gregory, for Cotton, the plaintiff.

From whence this mineral interest was to come does not appear. There is nothing to show that it was to be furnished or conveyed by E. Mary Gregory. The inference from what does appear, is rather that the firm of McMurtry & Gregory were to procure it from some other source, by their own means, and that the conveyance of the lots in question by Cotton to Mrs. Gregory was to be the consideration therefor, and enure to their benefit. It would seem, therefore, that Cotton intrusted his escrow if not to his nominal grantee, at least to the real parties interested therein. And it will be noticed that its final delivery was not dependent upon the receipt of the

deed for the interest in the silver mine by Cotton, but by McMurtry & Gregory, his agents, and the parties who had undertaken to obtain it. As before shown the plaintiff's escrow was to be delivered to the grantee named therein when McMurtry & Gregory should receive for Cotton a proper conveyance of the mining interest provided for. By the finding of the referee no tender of such conveyance to Cotton was necessary before the escrow was passed over to Mrs. Gregory, so that the fifth finding, that "plaintiff was never given or tendered any conveyance, sufficient or otherwise, of any interest in the Buchanan Silver Mine, at any time before the commencement of this action," is wholly immaterial, as McMurtry & Gregory do not appear to have been under any obligation to make such tender. If they had received such conveyance for Cotton, and held it subject to his order, that would have fulfilled the condition of the deposit of the escrow. There ought, therefore, to have been a finding upon this point, in order to show the defendants in default.

The referee also finds that after the delivery of the deed to E. Mary Gregory, one of the lots therein described was sold to one Jacob Zeh, to whom title thereto was conveyed through the deed in controversy; and in reference to this sale and conveyance to Zeh, the referee finds that Cotton first learned of it in October or November 1876; and, in December 1876, McMurtry, one of the firm of McMurtry & Gregory, to whom the deed was intrusted in escrow, paid and turned over to plaintiff the proceeds, "*which plaintiff received and retains.*

From the fact of the receipt of the proceeds of the sale of this lot to Zeh, the referee concludes, very properly, that the plaintiff had notice, in December 1876, of the delivery of the deed to Mrs. Gregory. That he had such notice is abundantly shown, also, by this other fact, found by the referee, viz.: that in "May or June 1875, and before plaintiff heard of the sale to Zeh, E. Mary Gregory sent by mail to Georgetown, Colorado, where he then was, a deed of reconveyance of the premises, * * * with warranty of title, which deed plaintiff retained in his possession about two years," when he returned it to her. This return, however, was not until he discovered that certain encumbrances had been put upon the lots while the title was in Mrs. Gregory.

After this notice that the deed was delivered, and having thus recognised it as valid for the transmission of title to Zeh and to

himself, surely Cotton is not in a position to claim successfully, that it is void for want of delivery as to other *bona fide* purchasers, without notice of his latent equity in the property. With this view of the case, an inquiry becomes necessary as to the *bona fides* of the claims of other of the defendants, third parties, who by the pleadings are shown to have interests that should be disposed of, and which seem to have been entirely overlooked or disregarded by both referee and court. To determine these interests properly, a reformation of the pleadings may be necessary. And, holding as we do, that under the facts found by the referee, there was a valid delivery of the deed as to innocent third parties, and it being conceded that Mrs. Gregory has already voluntarily made and delivered to the plaintiff a deed of reconveyance of all her interest in the lots, which for aught that appears, is still available to him, it is exceedingly doubtful whether, without such reformation any relief whatever could be afforded in this form of action. It may be that he should resort to the covenants of the deed of reconveyance, or to an action for damages against his agents, McMurtry & Gregory.

While we recognise fully the rule, that a fraudulent delivery by or procurement from the depositary of a deed, deposited as an escrow, will not operate to pass the title, even in favor of a subsequent purchaser in good faith, without notice, still we cannot permit it go to the extent of enabling the grantor to affirm or recognise the grantee's possession of the instrument as valid for some purposes, and to disclaim it as being nugatory for all others, especially when to do so, would result in injury to an innocent party.

For these reasons the judgment must be reversed, and the cause remanded to the court below, for further proceedings in conformity herewith.

Reversed and remanded.

It is familiar doctrine of elementary law, that a deed takes effect only from the time of its delivery; that at law an escrow takes effect as a deed (the condition having been performed), only from the date of its second delivery, that is, from the date of its delivery by the depositary to the grantee or to some one representing him: *Dyson* v. *Bradshaw*, 23 Cal. 528; *Green* v. *Putnam*, 1 Barb. 500. Until such delivery is made, the estate remains in the grantor or his heirs: *Green* v. *Putnam*, 1 Barb. 500; *Jackson* v. *Rowland*, 6 Wend. 669. Thus, where land is sold, part of the purchase price paid, and a deed executed and placed in the hands of a third person to be delivered to the grantee, and the balance of the purchase price to be paid on the happening of a certain event, if the grantor dies before the event happens, the title to the land does

not vest in the purchaser, but descends to the heirs of the vendor, subject to the equitable rights of the purchaser; and if the heirs afterwards make a deed to the purchaser, such deed conveys an absolute title to the land, and is not a deed of confirmation, because there has been no previous deed delivered nor estate to be confirmed: *Teneick* v. *Flagg*, 29 N. J. L. 25. And where a deed of land was delivered as an escrow, and an absolute delivery subsequently made, but previous to the second delivery a judgment was obtained against the grantor, under which the land was sold, it was *held*, that the purchaser under the judgment was entitled to the land: *Jackson* v. *Rowland*, 6 Wend. 666.

In equity, however, the title to the property conveyed, vests in the grantee immediately upon the performance of the condition upon which the escrow is to be delivered to the grantee by the depositary. It is the performance of the condition and not the second delivery, that gives an escrow vitality and existence as a deed: *State Bank* v. *Evans*, 15 N. J. L. 155. In *Stanton* v. *Millar*, 65 Barb. 58 (s. c. 58 N. Y. 192), it is said that where the contingency upon which an escrow was to be delivered, viz., the death of the grantor, had happened, and the grantees had fully performed the contract on their part, the arrangement created an absolute, equitable (if not legal) title on the death of the grantor; and that the grantees were entitled to a delivery, and the custody of the deed, and to have the same recorded.

Deeds may be delivered to arbitrators for their disposal, as they shall award the title; and upon the award being published, the deed to the person in whose favor the award is made becomes absolute: *Peck* v. *Goodwin*, Kirby (Conn.) 64.

But, while the general rule is, that an escrow becomes effectual as a deed, in equity, from the date of performance of the condition, and at law from the date of the second delivery, yet, where the parties make known their intention that the escrow shall, after condition performed, take effect from the date of the deed, instead of from the date of performance or of delivery, such intention will control. Thus, where deeds were executed May 1st 1860, and it was agreed that if certain bonds and mortgages were delivered by the fall of that year, such deeds, which were placed in the hands of the attorney of the grantee, should take effect May 1st 1860, it was held, that by such agreement the deeds took effect from that day, if the bonds and mortgages were delivered within the time specified; *Price* v. *Pittsburgh, &c., Railway Co.*, 34 Ill. 13.

In the absence of any expression by the parties of an intention as to when it shall become effectual, an escrow may take effect as a deed, from the date of its deposit or first delivery, in cases where it is necessary that it shall so take effect, in order to protect the grantee against intervening rights. Thus, where, after the deposit of an escrow, the grantor dies or becomes insane, or, if a *feme sole*, marries before performance of the condition, the law will make the second delivery relate back to the time of the deposit of the escrow: 1 Shep. Touch. 123. And see *Lessee of Shirley* v. *Ayres*, 14 Ohio 307; *Beekman* v. *Frost*, 18 Johns. 543; *Hatch* v. *Hatch*, 9 Mass. 307; *Hall* v. *Harris*, 5 Ired. Eq. 303; *Harkreader* v. *Clayton*, 56 Miss. 383. So, where a deed was deposited by the grantor with W., as an escrow, to be delivered to the grantee, on his producing a mortgage executed and recorded and a certificate of the clerk, of there being no other incumbrance of record; and W., on receiving the mortgage and the certificate of registry by the clerk, delivered the deed to the grantee and the mortgage to the grantor: *Held*, that the condition was performed and the deed well delivered to the grantee, and

that it related back so as to give effect to an intermediate conveyance by the grantee to C., although the clerk made a mistake in the registry of the mortgage: *Beekman* v. *Frost*, *supra*.

It is not, however, an universal or even a general rule, that the doctrine of relation attaches to instruments of this character. It is only allowed in cases of necessity, to avoid injury to the operation of the deed, from events happening between the first and second delivery: *Loubat* v. *Kipp*, 9 Fla. 61.

Performance of the condition and delivery of the deed are necessary fully to pass the title to the grantee. Performance of the condition is always essential, though, as already shown, at least an equitable title would pass without delivery. If, without performance of condition, the depositary, without authority or in fraud of the grantor, delivers the escrow to the grantee, it will be inoperative as a deed in the latter's hands, though he be ignorant that the depositary acted without authority or fraudulently. Under these circumstances, it will be inoperative even if the grantee take it in good faith, not knowing that there is any condition imposed upon its delivery, and although he advances a valuable consideration upon it; *Smith* v. *South Royalton Bank*, 32 Vt. 341; *Abbott* v. *Alsdorf*, 19 Mich. 157; *State Bank* v. *Evans*, 15 N. J. L. 155; *Peter* v. *Wright*, 6 Ind. 183; *Harkreader* v. *Clayton*, 56 Miss. 383.

An escrow may be recorded, and since recording is not *per se* evidence of delivery, the recording of such deed, with the knowledge and consent of the grantor and grantee will not render it binding upon the former, in case of a fraudulent delivery of it by the depositary to the grantee, and assignment by him to a *bona fide* assignee for value, if the grantor consented to such recording, with the express understanding that the depositary should still retain the deed after it was recorded, until the performance of the condition upon which it was to be delivered: *Smith* v. *South Royalton Bank*, 32 Vt. 341.

A fortiori no title passes to a grantee, who by his own fraud obtains possession of a deed deposited as an escrow. In *Roberts* v. *Mullenix*, 10 Kans. 22, where possession of a bond deposited in escrow was fraudulently obtained by the obligee, and by him assigned, it was held that no right passed to the assignee as against the obligor. The reason of this rule is obvious: to give effect as a deed to an escrow fraudulently obtained by the grantee is to allow him to take advantage of his own wrong. Obtaining the deed by fraud, larceny, or any means short of performance of the condition, is against the assent of the grantor, and as assent is necessary to delivery, and a delivery to the validity of the deed, the grantee gets no title, and cannot transmit any, even to a *bona fide* purchaser, from him without notice and for value: *Harkreader* v. *Clayton*, 56 Miss. 383; *Everts* v. *Agnes*, 6 Wis. 462; s. c. 4 Id. 343; *Boyle* v. *Boyle*, 6 Mo. App. 594, note.

The fraudulent delivery by or procurement from the depositary, of a deed deposited in escrow, being voidable, it is very properly ruled in the principal case that, if avoided at all, it must be avoided *in toto*: and that, if the grantor once affirms the deed, he cannot thereafter avoid it.

M. D. EWELL.

CHICAGO.

Supreme Judicial Court of Maine.

WILLIAM L. PRINCE *v.* WILLIAM B. SKILLIN.

The legislature has full control over the forms of process and the rules of procedure.

All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to legislative control.

Where there are two conflicting legislatures, each claiming of right to exercise legislative functions, it is for the courts, whenever the question comes before them, to determine by which body legislative authority has been lawfully exercised.

The action of the governor and council as a canvassing board is not final and conclusive. As to the members of the legislature such action is subject to the revision of the Senate and House of Representatives respectively. As to county officers it is subject on proper process to judicial investigation before judicial tribunals.

An election is not to be set aside because illegal votes have been cast which do not affect the result.

The votes of a city or town are not to be rejected because the word "scattering" was written upon a ballot, or because the clerk may have returned a ballot as so cast when it was not.

THE plaintiff, claiming to have been duly elected county commissioner for the county of Cumberland, brings this bill against the defendant, whom he alleges to have been wrongfully declared elected to that office, when, in fact, he was not so elected.

This proceeding is under and by virtue of c. 198 of the Acts of 1880, entitled "an act providing for the trials of causes involving the rights of parties to hold public offices."

The opinion of the court was delivered by

APPLETON, C. J.—The processes by which rights are to be established and wrongs redressed are within and subject to legislative control. Old forms and modes of procedure may be abolished and new ones established.

All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the legislature. There is, with the above exception, no vested right in an office or its salary. The office may be abolished. The mode of appointment may be changed. The length of time of official existence may be shortened. The compensation for official services may be diminished: *Farwell* v. *Rockland*, 62 Maine 298; *Butler* v. *Pennsylvania*, 10 How. (U. S.) 403; *Barker* v. *Pittsburgh*, 4 Barr 51; *Conner* v. *New York*, 1 Selden 291; *Taft* v. *Adams*, 3 Gray 126.

The Act c. 198 of the Acts of 1880, was passed to enable parties duly elected to office, but not declared to be so elected, to contest their rights before a judicial tribunal. The defendant was declared elected to the office in controversy by the canvassing-board of the state. The allegations in the bill are, that errors occurred in the doings and proceedings of the board, and that upon a fair and honest count the plaintiff was duly elected, but that the defendant has usurped the office to which he was so elected. "When one is charged with usurping an office in the Commonwealth, there must be," remarks the court in *Commonwealth* v. *Fowler*, 10 Mass. 290, "authority in this court to inquire into the truth of the charge." This act gives a remedy in case of an erroneous or fraudulent count by the canvassing-board. It will hardly be contended that if by errors of computation, throwing out legal returns or counting illegal ones, a candidate not duly elected is wrongfully declared to be elected, there should not be some remedy provided for the party actually elected, by which the wrong done may be corrected. If the error is not subject to correction, then the canvassing-board, in the exercise of irresponsible power, have full and absolute control of the government, and may effectually stifle the voice of the people according to their sovereign will and pleasure.

Before the passage of the act under consideration, the only existing process by which right of one unlawfully holding an office could be inquired into, was by *quo warranto*. This writ issues in behalf of the state against one who claims or usurps an office to which he is not entitled, to inquire by what authority he supports his claim or sustains his right. The proceeding is instituted by the attorney-general on his own motion or at the relation of any person, but on his official responsibility. It lies against an officer appointed by the governor and council or elected by the people. It removes the illegal incumbent of an office, but it does not put the legal officer in his place. It is insufficient to redress the wrongs of one whose rights have been violated.

To restore a person to an office from which he has been unjustly removed or unlawfully excluded, the proper process is by mandamus. By this, the rights of one lawfully entitled to an office, but which have been illegally withheld, may be enforced: *Strong's Petitioner*, 20 Pick. 497.

By *quo warranto* the intruder is ejected. By mandamus the legal officer is put in his place. The Act c. 198, accomplishes by

one and the same process the objects contemplated by both these processes. It ousts the unlawful incumbent. It gives the rightful claimant the office to which he is entitled. It affords a speedy and effectual remedy instead of the tedious and dilatory proceeding of the common law.

It is insisted that this bill for various reasons cannot be sustained. The grounds of objection to its maintenance we propose to examine.

1. The respondent contended that the legislature which passed the act authorizing this and the governor approving it, could not rightfully do so, because there was a prior *de facto* legislature with a *de facto* governor, as set forth in the respondent's answer, not ousted by any competent tribunal.

The act in question was passed by an organized and acting legislature, approved by the governor, and comes before us with all the indicia of validity by which any act of any past legislature is or can be evidenced.

When there are two conflicting legislatures, each claiming of right to exercise legislative functions, it is for the court to determine by which body legislative authority can be lawfully exercised. In answer to inquiries made by certain gentlemen claiming official position, under date of January 23d 1880, this court used the following language: "When different bodies of men, each claiming to be and to exercise the functions of the legislative department of the state, appear, each asserting their titles to be regarded as the law-givers for the people, it is the obvious duty of the judicial department, who must inevitably, at no distant day, be called to pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of those bodies lawfully represents the people from whom they derive their power. There can be but one lawful legislature. The court must know, for itself, whose enactments it will recognise as laws of binding force, whose levies of taxes it will enforce when brought judicially before it, whose choice of a prosecuting officer before the court it will respect. In a thousand ways, it becomes essential that the court should forthwith ascertain and take judicial cognisance of the question, which is the true legislature?"

We are bound to take judicial notice of the doings of the executive and legislative departments of the government, when

called upon by proper authorities, to pass upon their validity. We are bound to take judicial notice of historical facts, matters of public notoriety and interest passing in our midst. These views are in full accord with the decisions of our highest tribunals. In *Swinnerton* v. *Columbian Ins. Co.*, 37 N. Y. 188, it was objected that there was no evidence of a civil war. "This objection," observes HUNT, J., "I do not consider a sound one. The rule I take to be this: That matters of public history, affecting the whole people, are judicially taken notice of by the courts; that no evidence need be produced to establish them; that the court in ascertaining them, resort to such documents of reference as may be at hand and as may be worthy of confidence. Thus in the prize cases already cited (2 Black 667) the court use this language: 'The actual existence of civil war is a fact in our domestic history which the court is bound to notice and to know.' There the general facts connected with the history of the case seem to have been assumed as within the judicial cognisance of the court. Greenleaf in his work on Evidence, vol. 1, § 6, says, 'courts will also judicially recognise the political constitution or frame of their own government; its essential political agents or public officers, sharing in its regular administration; and its essential and regular political operations, powers and actions. Thus notice is taken by all tribunals of the accession of the chief executive of the nation or state, under whose authority they act; his powers and privileges, &c., * * * the sittings of the legislatures and its established and usual course of proceedings. * * * In fine, courts will take notice of whatever ought to be generally known within the limits of their jurisdiction. In all these and the like cases, when the memory of the judge is at fault, he resorts to such documents of reference as may be at hand, and he may deem worthy of confidence.' It is the duty of the court to know county officers: *Farley* v. *McConnell*, 7 Lans. 428; much more the governor and legislature: *State* v. *Minnick*, 15 Iowa 123."

After a careful consideration of the grave and important questions proposed by the governor, the rightful legislature and a body of gentlemen claiming, but without right, to be a legistature, this court in its several answers of January last, announced the result to which it had arrived: that the legislature by which the act under discussion was passed, was the legislature to whose acts the obedience of the people is due. In the correctness of the conclusions which

were then reached, and in the principles and reasons upon which those conclusions are based, we rest in perfect confidence.

To the same general effect are the cases of *Wood* v. *Wilder*, 43 N. Y. 164; *Cuyler* v. *Ferrill*, 1 Abb. (U. S.) 169; *Rice* v. *Shook*, 27 Ark. 137; *Killebrew* v. *Murphy*, 3 Heisk. (Tenn.) 546; *Division of Howard County*, 15 Kansas 194; *Turner* v. *Patton*, 49 Ala. 406; *Ashley* v. *Martin*, 50 Id. 537; *Smith* v. *Speed*, Id. 276; *Andrews* v. *Knox County*, 70 Ill. 65; *Douthitt* v. *Stinson*, 63 Mo. 268; *Foscue* v. *Lyon*, 55 Ala. 440.

The body of men which the counsel for the defendant terms by courtesy a *de facto* legislature, though its house was composed of men who were and who were not elected—both classes not constituting a quorum—and of a senate, a part of whom, less than a quorum, were duly elected, and a part were not elected, could not legally act as legislative bodies. While this condition of affairs remained there was no legal legislature. The greater portion of the members of the bodies thus constituted took their seats respectively in the rightful house and senate—a house and senate composed of members unquestionably elected. They participated in its legislative action until its final adjournment. They received and acknowledged the receipt of the compensation to which by law they were entitled as members of the legislature. There was no other body claiming to exercise legislative functions. What the counsel calls the *de facto* legislature became merged into the rightful legislature, by which a governor was chosen in the accustomed manner, who entered upon and is now discharging, without interference or obstruction, the duties of that office. All this is well known as matter of current history, as well as by the legislative journals.

The offered proof was properly excluded. It is immaterial whether or not at some past time there was a *de facto* legislature or a *de facto* governor—inasmuch as neither was such *de jure*—and as the rightful legislature was not interfered with in the exercise of its legitimate powers, and the rightful governor is not disturbed in the discharge of his official duties. The acting legislature and the acting governor are both *de facto* and *de jure* the legislature and governor of the state, and to be recognised as such.

2. It is claimed that the decision of the governor and council acted as a final canvassing-board, and that their final action constitutes an estoppel upon all other branches of the government,

except the houses of the legislature in regard to the membership of those bodies.

This is not so. The object of all investigations is to arrive at true results. The canvassing-board, so far as relates to county commissioners, are limited and restricted to what appears by the returns, except that by Revised Statutes c. 78, § 5, and c. 212 of the Acts of 1876, "they may receive testimony on oath to prove that the return from any town does not agree with the record of the votes of such town, or the number of votes, or the names of the persons voted for, and to prove which of them is correct; and the return when found to be erroneous may be corrected by the record; and the governor and council are required to count and declare for any person all votes intentionally cast for such person, although his name on the ballot is misspelled or written with only the initial or initials of his christian name or names; and they may bear testimony upon oath in relation to such votes in order to get at the intention of the electors and decide accordingly." But they are nowhere authorized to extend their inquiries beyond these limits; to inquire into the validity of meetings; whether or not votes were cast by aliens or minors, or any of the various questions involving the validity of the result. Their judgment is not made conclusive. In case of senators and representatives, the final determination rests with the senate and house. So in reference to county officers, the courts in the last resort must determine the rights of the parties. If it were not so, if the canvassing-board erred in their computations; if they should wilfully or ignorantly disregard the law; rejecting legal and valid returns, and receiving and acting upon illegal and invalid returns, there would be no remedy for the party duly elected. "If," say the court, in their opinion (25 Maine 570) "the legislature had deemed it expedient, and had actually intended to constitute the governor and council judges generally of the election of county officers, it would have been easy for them to have been explicit to that effect; not having done so, it must be presumed that nothing of the kind was intended." It is abundantly obvious this must be so, since the right of full investigation is withheld from them.

County commissioners hold their office by popular election. If one not legally elected, is erroneously declared to be elected, the will of the people is disregarded. An usurper holds an office to which he has no right. "The usurpation of an office is not an

invasion of executive prerogative," observes NOTT, J., in *State* v. *Deliesseline*, 1 McCord 52, "but of the rights of the people; and the only method by which these rights can be protected, is through the instrumentality of the courts of justice."

In accordance with these views it has been uniformly held by this and all other courts where the question has arisen, that the decision of the canvassing-board is only *prima facie* evidence, that the real title to an office depends upon the votes cast, and that the tribunal before which the question arises, will investigate the facts of the election, the votes cast, and the legality of the action of the canvassing-board: *People* v. *Cook*, 8 N. Y. 67; *People* v. *Vail*, 20 Wend. 12; *State* v. *Governor*, 1 Dutch. 348; *People* v. *Thacher*, 55 N. Y. 525. The series of opinions of this court from that in 25 Maine 568, to the present, concur in the conclusion that the action of the governor and council, so far as relates to all matters pertaining to the case under consideration, in canvassing the returns, is purely ministerial, and is to be confined strictly within the bounds of the constitution and the statutes enacted in furtherance of the constitution.

The underlying principle is that the election and not the return is the foundation of the right to an elective office, and hence it has been held competent to go behind the ballot box, and purge the returns by proof that votes were received and counted, which were cast by persons not qualified to vote: *People* v. *Pease*, 27 N. Y. 45. "Freedom of inquiry in investigating the title to office," observes ANDREWS, J., in *People* v. *Thacher*, 55 N. Y. 531, "tends to secure fairness in the conduct of elections, faithfulness and integrity on the part of returning officers, and it weakens the motive to fraud or violence by diminishing the chances that they may prove successful in effecting the objects for which they are usually employed.

3. The ground is taken "that the vote of the city of Portland was rightly rejected as illegal by the governor and council, the return thereof not being in accordance with the statute, in that it did not contain the names of all the candidates voted for with the number of votes set against them."

It is conceded that if the vote of Portland is to be counted, the plaintiff was duly elected. The whole number of votes cast was six thousand three hundred and thirteen, of which two were returned as scattering.

None of the votes of the city of Portland were counted. They were all thrown out. Why? Because the ward meetings were not regularly notified? Because the ward meetings were not legally organized? Because those not qualified electors were permitted to vote? Because there was fraud or intimidation at the meeting? Because the votes of qualified voters were rejected? Because the votes were not received, sorted, counted and declared in open ward meeting? Because a fair record of the result was not seasonably made? Because the returns duly sealed and attested were not transmitted to the secretary of state within the time required? Because of any informality, great or small? No. None of these causes were pretended,—much less proved,—but because out of the whole number of votes cast, two were returned as scattering, that is because two wrote scattering on their ballots or because two voted for candidates not voted for by anybody else, and the clerk returned them as scattering instead of giving the names of persons for whom the votes were cast. Thus and for such cause, six thousand three hundred and eleven voters, being over a third of the voters of the county of Cumberland, were disfranchised—for they were equally disfranchised whether they voted for one candidate or the other. This disfranchisement was for no neglect or omission of theirs.

This is a government of the people. Their will as expressed by the ballot is what is to be ascertained and declared. To disfranchise six thousand three hundred and eleven voters because two ballots were returned as scattering, is a novel mode of giving expression to the popular will. If the citizens voting can have their votes nullified for such cause, any voter by writing "scattering" on his ballot or any clerk by returning a vote or votes under this head, may annihilate a majority however large. No man can be sure his vote will be effective.

The word "scattering" written on a ballot indicates the name of an individual or it does not. If a name then it should be counted. If it is not the name of an individual, then perhaps it may be regarded as a blank vote. It is, at any rate, a ballot. It is provided by Revised Statutes, c. 4, § 32, as amended by c. 212 of the Acts of 1878, that "in order to determine the result of any election by ballot, the number of persons who voted at such election, shall first be ascertained by counting the *whole* number of ballots given in, which shall be distinctly stated and recorded." The *whole* number of ballots counted, including the votes returned scattering, the petitioner was most assuredly elected; for in the case

under consideration, these votes however added or subtracted would not have changed the result.

The office of county commissioner is one created by statute, not by the Constitution. As a canvassing-board, the governor and council act in relation to this office under Revised Statutes, c. 78, § 5, as amended by c. 212 of the Acts of 1878, and by that act the *whole* number of ballots given should have been counted. Had they been so counted the plaintiff's election was assured.

The rule obtains in every state, that an election is not to be set aside and declared void, merely because certain illegal votes were received, which do not change the result of the election: *The People* v. *Tuthill et al.*, 31 N. Y. 550; *Judkins* v. *Hill*, 50 N. H. 140; *School District* v. *Gibbs*, 2 Cush. 39. In *Ex parte Murphy*, 7 Cow. 153, two ballots were put in the box on the names of two persons who were formerly voters, but who had died some weeks before the election. "To warrant the setting aside the election," the court observes, "it must appear affirmatively, that the successful ticket received a number of improper votes, which if rejected, would have brought it down to a minority. The mere circumstance that improper votes were received, will not vitiate an election." The entire vote should never be rejected, when it is possible to ascertain the fraudulent vote: *Mann* v. *Cassidy*, 1 Brewster (Penn.) 32. In an action to determine the right to an office, the court may look beyond the returns and even the ballot boxes, if necessary, to ascertain the truth: *The People* v. *Cook*, 14 Barb. 259.

Now there is no allegation whatever that illegal or fraudulent votes were cast. Whether the votes returned as scattering were cast by persons not authorized to vote, or fraudulently cast, or for a candidate ineligible, or erroneously returned as scattering by mistake or fraud, inasmuch as they did not change the result, the petitioner having a plurality of over six hundred votes should have been declared elected.

It is proper to add that the amended return shows the names for whom the votes counted as scattering were given—to wit: William B. Skillin. So that in truth, there remains no conceivable ground upon which the respondent can claim to hold over.

The decision of the canvassing-board was at war with the law of the land, the rights of parties, the will of the people and the principles upon which alone a republican government can rest.

Judgment for the petitioners.

Court of Appeals of Maryland.

BROWN v. HAZLEHURST.

A receiver ought regularly to apply to the court under whose authority he is acting for leave to expend the funds of the trust even for purposes beneficial to the property, as *e. g.* for insurance.

But where he does insure without leave, if the circumstances were such that leave would have been granted, a court of equity will ratify his act as if it had been authorized at the time.

On exceptions to a receiver's account.

There being a bill pending to set aside a conveyance and exchange of certain real estate, consisting of a hotel and stores in the city of Baltimore, plaintiff was appointed receiver of the property, and upon the termination of the suit, filed his report and account.

An item of credit in the account, amounting to $187, for the renewal for one year of policies of insurance on the hotel, was excepted to by the complainant in the original bill. The policies were the same which the complainant had himself taken out the year before, and the premiums paid were the same. The receiver had not applied to the Circuit Court for authority to renew the insurance.

The exceptions were sustained by an order of the Circuit Court, and from this order the receiver appealed.

F. J. Brown and *T. B. Mackall*, for appellant.

James Mackubin, for appellee.

The opinion of the court was delivered by

Alvey, J.—There is no doubt of the general rule, and it is a wholesome one, that a receiver will not be permitted to lay out more than a small sum, at his own discretion, in the preservation or improvement of the property under his charge; but he should in all cases where it is practicable, or the circumstances of the case will permit, before involving the estate in expense, apply to the court for authority for so doing. But this general rule, however salutary it may be, should not be so rigidly and sternly enforced as to work wrong and injustice, where the receiver has acted in good faith and under such circumstances as will enable the court to see that if previous authority had been applied for it would have

been granted. The justice and right of the matter must depend, to a great extent, upon the special circumstances of each case that may be presented.

In the case of *Blunt* v. *Clitherow*, 6 Ves. 799, the receiver applied to be allowed some 461*l.* as money expended in repair of the dwelling-house on the estate, and the claim being resisted upon the ground that the expenditure had not been sanctioned by the court, the Master of the Rolls, Sir WILLIAM GRANT, directed an inquiry into the circumstances of the expenditure, and whether the same was for the benefit of the estate, and it afterwards appearing that the expenditure was made by the direction of the trustees, the claim was allowed without further objection or inquiry.

So in the case of the *Attorney-General* v. *Vigor*, 11 Ves. 563, upon motion that the receiver should be allowed for necessary repairs that had been done, Lord ELDON directed an inquiry whether the repairs were reasonable, at the same time observing that the court was not in the habit of permitting receivers and committees to apply the trust funds in repairs to any considerable extent without a previous application.

And again, in the case of *Tempest* v. *Ord*, 2 Mer. 55, upon application for a restraining order upon a receiver against paying out funds for the erection of buildings upon the premises without the previous direction of the court, Lord ELDON said that formerly the court never permitted a receiver to lay out money without a previous order of the court, but now where the receiver had laid out money without such previous order, it was usual to refer it to the master to see if the transaction was beneficial to the parties, and if found to be so, the receiver was allowed the money so laid out, and accordingly an order was made referring the matter to the master to consider and state to the court whether the buildings then being erected were fit and necessary and for the benefit of the several parties interested in the premises.

It thus appears that the right of the receiver to have allowance for his expenditure on account of the estate, does not always depend upon his having obtained the previous order of the court, but it may depend upon the circumstances and requirements of the estate.

In this case the receiver was appointed by the court under an agreement of the parties, and by the agreement and order he was alone to have charge of the property specified. His appointment

determined no right, nor did it affect the title of the property in any way; the legal title was in the complainant in the cause, Mr. Hazlehurst, subject to the ultimate judgment of the court, and the appointment of the receiver was for and on behalf of all the parties concerned, and not of the complainant only. The order making the appointment was without special directions as to powers and duties; it simply placed him in the exclusive charge of the property. The property consisted of a large hotel and several stores thereunder in the city of Baltimore.

At the time the receiver took possession he found the hotel property under an insurance in several offices, to an aggregate amount of $25,000. This insurance had been placed upon the property by Mr. Hazlehurst, the party now objecting to the allowance to the receiver of the premiums paid for renewals or keeping alive these policies on the property. The ground of objection is, that a previous order ought to have been obtained before the renewal premiums were paid by the receiver. In other words, that the premiums were paid by the receiver without authority, and, therefore, he has no right to claim reimbursement under the circumstances of the case. To this, under the circumstances, we do not agree. There is not the least pretence that there was any want of good faith on the part of the receiver in continuing the insurance on the hotel property. On the contrary, it is conceded by the learned judge below, and not controverted by counsel, that the nature of the property, and the fact that it was not occupied, rendered it proper that it should be insured. In this we suppose every one will agree.

It is therefore safe to assume that if application had been made to the court for authority to continue the insurance on the property, it would have been given. In keeping the policies alive, the receiver was only keeping the property in the condition that he found it in. The very object and purpose of his office was to preserve and protect the property for the party who should ultimately be declared to be the owner of it; and the continuing the insurance was but a safe and usual means to the end to be accomplished. It was not for the one party or the other to object to the insurance; the court having assumed control and jurisdiction over the property would have directed what was proper and reasonable for its protection; and while it would have been proper and more regular for the receiver to have applied for authority to

insure, we think his act in continuing the existing policies should be adopted by the court, upon the principle that where a trustee or other officer of the court has exercised a power which, if previously applied for, would, without doubt, have been granted, a court of equity will, in the absence of proof showing the inexpediency and injustice of so doing, ratify and adopt the act done, as if it had been previously authorized: *Tyson* v. *Mickle*, 2 Gill 376. The adoption or rejection of the act must depend not on the events subsequently occurring, or the final result of the suit, but on the state of things existing and apparent at the time of the act done. The amount of the premiums paid was only $187.50, and it is shown in proof that it has been customary, though certainly not strictly justified upon principle, for receivers to insure property under their charge without special orders of the court, and to have their expenditures allowed. Under the circumstances of this case, we think the receiver should be allowed the amount of the premiums paid by him, and we shall therefore reverse the order appealed from, and remand the cause.

Order reversed and cause remanded.

ROBINSON, J., dissenting.—Without the direction of the court or the consent of the parties in interest, the appellant insured the hotel property for $25,000, and the question in this appeal is, whether he should be allowed, in the account of his receivership, the premiums paid by him on the policies of insurance.

The bill under which the appellant was appointed, prayed for the appointment of a receiver to collect and receive the rents, pending the litigation, and the order of the court by which he was appointed, directed that he should have charge of the property. The language of the order is broad enough to embrace all the powers usually belonging to the office of a receiver, but we cannot agree that it confers the extraordinary powers to make repairs and insure the property as explicitly as if special directions to that effect had been inserted.

According to our construction, it conferred upon the appellant the usual and ordinary powers of a receiver. The question then is, what are such powers? All agree that he is but the officer of the court, or as he is sometimes styled, the hand of the court, his possession being nothing more or less than the possession of the court, and yet it is obvious that it is an office of trust and confi-

dence, necessarily involving to some extent, the exercise of discretionary powers. But all the authorities agree that this discretion is one of the most limited character, and that he ought, from time to time, to apply to the court for authority to do such acts as may be beneficial to the estate. Strictly speaking, according to the earlier English practice, he had no right to bring or defend actions, or to let the estate, or to lay out money for any purpose, unless by special leave of the court: Story's Eq. Jur., vol. 2, sect. 833· Jeremy's Eq. Jur., b. 1, ch. 7, sect. 1. And in *Swaby* v. *Dickon*, 5 Sim. 629, where the receiver had, without authority of the court, defended an action growing out of a distress made by him upon the tenant of the estate, the court refused to allow him his costs of the action.

A more liberal practice now prevails, and where it satisfactorily appears that the receiver has acted in good faith and without prejudice to the interests of the parties, courts are disposed to ratify the exercise of a reasonable discretion. It is always safe, and the proper practice, to apply to the court for directions in regard to the expenditure of money, because he has no right to involve the estate in expense, without the sanction of the court. We have not been able, after a careful examination, to find a case in which the power of a receiver to insure property without the direction of the court has been recognised, and yet we do not mean to say that in no case should the premium paid by him for insurance be allowed. We are constrained, however, to say that under the circumstances of this case, the premium paid by the appellant was properly disallowed by the court.

In the bill under which the appellant was appointed, the complainant charges that the defendants, McShanes, represented this hotel as being valuable property, under a lease to a responsible tenant for five years, at a yearly rental of five thousand dollars, and that upon the faith of such representations the exchange of properties was made. That subsequently he discovered that the hotel property was without any rental value whatever, that it was burdened with yearly ground-rents, amounting to twenty-five hundred dollars, and without setting out all the allegations in the bill, it is sufficient to say the complainant substantially charged that the property was without any actual or marketable value. These averments, it is true, are denied by the defendants, but the appellant had notice that the complainant, then in possession, and to whom

it was ultimately decreed the property belonged, had under oath alleged that it was without any value.

In addition to this it appears that the appellant was unable to rent it, and never received one dollar rental from the hotel proper during his receivership. In view of these facts, whatever may have been the judgment of the appellant in the premises, it was plainly his duty to have applied to the court for authority before subjecting the estate to the expenses of insurance on policies amounting to $25,000.

In reply to this it was said he found the property insured at the time of his appointment, and he did nothing more than renew the policies. But this insurance was effected by the complainant, immediately upon the exchange of the properties, and at a time when relying upon the representation of the defendants, he estimated its value at $25,000. So soon, however, as he found out that the property was in fact without any value whatever, he filed a bill to set aside the exchange on the ground of fraud, and this bill was pending when the appellant renewed the policies.

Now, although we are satisfied the receiver in this case acted in good faith, yet it would be a wide departure from the well settled practice limiting and defining the powers of receivers to allow, under such circumstances, the appellant to burden the estate with the costs of insurances on policies amounting to $25,000, when the very bill under which he was appointed alleged that the property was without any value. To say the least, it was the duty of the receiver to have applied to the court for the authority to insure before subjecting the parties in interest to such costs. For these reasons I dissent from the opinion of the majority of the court.

United States Circuit Court; District of Indiana.

ADAMS, ASSIGNEE IN BANKRUPTCY OF VAN CAMP & SON, *v.* MERCHANTS' NATIONAL BANK OF INDIANAPOLIS.

While in some respects an assignee in bankruptcy stands in the place of the bankrupt himself, with no other or different rights or equities, in many other respects he occupies a different position as the representative of the creditors, and particularly where acts have been done by the bankrupt, the effect of which is to impair the legal or equitable rights of creditors.

An assignee has the rights of a judgment-creditor, where a mortgage or pledge is invalid for want of any element requisite under the law.

A firm, shortly before its bankruptcy, applied to its bank for a loan of money to buy apples. The bank made the loan, placing the money to the credit of the firm's general account, upon the execution of a note by the bankrupts with certain sureties, and on *the condition*, that said bankrupts would convert their storehouse into a public warehouse, by taking out a permit therefor, under the state statute, and would place the apples as purchased in said warehouse, issuing warehouse receipts therefor, to a third party, to be by him indorsed and left with the bank, as *collateral security* for said loan; which was done, but the apples remained in said warehouse in the possession of the bankrupts until after their bankruptcy, and then came into the possession of the assignees. *Held*, that said receipts were not valid warehouse receipts under the statute, or at common law.

Held, also, that there was no pledge of the property, because the possession was not in the pledgee.

Held, also, that the contract was in the nature of a chattelmortgage, and invalid as to creditors for want of possession in the mortgagee or record, as required by the statute of Indiana.

There is a distinction between the case of an attempt to secure or pay a precedent debt and that of a present receipt of money or property by the bankrupts, as part of the contract under investigation; but this alone cannot render a contract valid as against creditors, which otherwise is unlawful.

This was a petition to review the order and judgment of the District Court, under sec. 4986 U. S. Revised Statutes.

The statute of Indiana as to chattel-mortgages is as follows: "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in cases of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof."

The other facts are stated in the opinion

McMaster & Boice and *Judah & Caldwell*, for assignee.

R. O. Hawkins and *Dailey & Pickerill*, for defendants.

DRUMMOND, J.—In the fall of 1877, Van Camp & Son were engaged in business at Indianapolis, in buying and selling apples and other produce, and in the manufacturing and putting up of meats, fruits, &c. They had a storehouse at Indianapolis, where they kept articles which they wished to hold for better prices. At that time they applied to the bank for a loan of $2000. The bank agreed to make the loan upon the execution of a note by the bankrupts with certain sureties, and on the condition that they would

convert their storehouse into a public warehouse, of class "B," by taking out a permit therefor under the statute, and would place the eight hundred barrels of apples, for the purchase of which they made the loan, in the warehouse, issuing warehouse receipts therefor, to a certain person by name, the son of one of the firm, to be by him endorsed and left with the bank as collateral security. This arrangement was carried out, the note executed with sureties, the apples purchased and placed in the warehouse, for which a permit was taken out, the store being made a warehouse of class "B," and the receipts issued and endorsed to the bank as provided in the agreement. The son, to whom the receipts were given, had no interest in the property and had no business connection with the firm in any way. During the time that these transactions occurred, the bankrupts kept their general account with the bank, and deposited and drew out money as they received or needed the same; and the note, discounted by the bank, was placed as a credit to their general account. In January 1878, Van Camp & Son were adjudged bankrupts by the District Court for this district; and the apples, covered by the receipts referred to, together with the other property, came into the hands of the assignee and were sold by the order of the District Court, the proceeds being permitted to remain in the hands of the assignee, subject to the same rights which existed against the property itself. Upon application by the bank to the District Court, requesting that a lien might be declared in its favor on the fund arising from the sale of the apples, the assignee was ordered to pay the amount of the note out of the fund in his hands, on the ground that the bank had an absolute lien upon the property, for which it held the warehouse receipts. That order the assignee asks to have reviewed by this court; and the question before the court is, whether the bank had a priority of lien over the general creditors as the District Court adjudged.

There is nothing in the statement of the case to indicate that the bankrupts used their warehouse, as a warehouse under the statute, in any other way than for the purpose specially intended by the bank. It does not appear that the property of any other person than that of the bankrupts was stored in the warehouse. The case then was one where the bankrupts, having purchased and taken possession of property, stored it in their warehouse, for which a permit had been obtained as class "B," and issued receipts for the same and transferred them through a third person, to whom they were issued to the bank as collateral security for the loan made.

By the Act of March 9th 1875, 1 Davis (1876) 927, public warehouses are divided into two classes, "A" and "B." Any person or incorporation may keep a public warehouse, by obtaining a permit from the auditor of the county in which the warehouse is situated. The warehouse shall continue subject to the provisions of the law, until the owners shall file a notice in the auditor's office, renouncing the character of public warehousemen.

Class "A" embraces warehouses in which grain is stored in bulk, and that of different owners mixed together. Class "B" embraces warehouses where property *of any kind* is stored *for a consideration.*

Most of the sections following the first and second, to which reference has been particularly made above, refer to the storing of grain in warehouses of class "A." The 14th section of the act declares that receipts for property stored *in any class* of warehouses shall be negotiable and transferable by the endorsement of the warehouse receipts, which are to be given for the property stored; and the endorsement of the party to whom the receipt is given shall constitute a valid transfer of the property. The endorsement is to be deemed a warranty that the endorsee has a good title and lawful authority to sell the property named in the receipt.

All warehouse receipts for property stored in warehouses of class "B" are to distinctly state *on their face the brand or distinguishing mark* of the property.

The fourth section of the act provides specifically for the issue of a receipt for property stored in warehouses of class "A." There seems to be no such provision in relation to property stored in warehouses of class "B"; but the 14th section of the act speaks of warehouse receipts for property stored in any class of public warehouses, and includes of course class "B" as well as "A."

There is nothing to show that the money advanced by the bank to the bankrupts was specifically appropriated in the purchase of the apples covered by the receipts; but they seem to have been paid for as other purchases were, by checks on the bank drawn on the general account of the bankrupts. Independent of the fact that there is no evidence to show any other receipt issued by the bankrupts as warehousemen for property deposited in their warehouse, and of the fact claimed that these were receipts given by them of their own property in the warehouse, substantially to themselves (the son of one of the bankrupts being merely a nominal

party in whose name the receipts were issued and who endorsed them to the bank), the receipts can hardly be considered as valid under the statute. They are as follows: "Received of Cortland Van Camp, subject to his order, and deliverable on return of this receipt, 150 barrels of apples for storage in fruit house." Signed by the bankrupts and endorsed by Cortland Van Camp; the other receipts are similar. Now the statute of the state in relation to warehouses of class B. provides for property stored therein "for a consideration;" which can hardly be said to be true of the property in this case, as it belonged to the bankrupts themselves by whom the receipts were issued. And the law also declares that all warehouse receipts for property stored in warehouses of class B, should distinctly state on their face the brand or distinguishing mark of the property, which these receipts did not state, and so were not within the terms of the statute. I think, therefore under all the circumstances of the case they cannot be considered to come within the meaning of the special statute in relation to warehousse of class B. Indeed, that is hardly claimed by counsel; and so the case must turn upon the general law upon the subject.

If this had been a sale of the property to the bank and these receipts had been given upon the sale, there would, perhaps, not be so much difficulty about the case; but that is not claimed by the bank, and it is clear from the facts, that there was no sale unless the circumstances attending the transaction amounted to a sale. In nearly all the cases which have been cited in support of the decree herein, the court found that there was a sale of the property. For instance, in *Gibson* v. *Stevens*, 8 How. 384, the case proceeds throughout upon the assumption that the party through whom the plaintiff claimed the property, had purchased it of the warehousemen, who issued the receipts therefor. It was the case, therefore, of a sale of property for which receipts were given, and in consequence of which the vendors became bailees of the purchasers, and so the title of the property was in the purchasers or in their assignees by virtue of the endorsement of the warehouse receipts. The case of *Gibson* v. *Chillicothe Bank*, 11 Ohio St. 311, was in many respects like this, and there would seem, from a statement of the evidence, to be strong grounds for the claim that it was a case of mere security, although the contract under which the advances were made and the receipts given in that case are not set forth; but the court found that the receipts were not merely

given as security, but that the money was advanced upon an agreement that the title of the property was passed when the receipts were given; and that it was to be held for the payment of the advances made. In *Yenni* v. *McNamee*, 45 N. Y. 614, the court referred to the difference between the case of a sale of property for which a receipt was given and one where it was a mere security, distinguishing the case from that of *Gibson* v. *Stevens*, and holding that as the property was held merely as a security, and there was not an absolute sale, it came within the principle of a mortgage of chattels, and the law of the state not being complied with, it was invalid as against other creditors.

In the case of *Shepardson* v. *Green*, 21 Wis. 539, the owners of coal gave a warehouse-receipt to the plaintiff for a certain quantity of coal then in their possession. They treated the coal as their own, and sold portions of it to their customers, appropriating the proceeds to their own use, and afterwards a third person purchased all the coal which the parties who had given the warehouse-receipts then had in their possession. The court found against the warehouse-receipts in that case, and the judgment was affirmed by the Supreme Court on the ground the receipt was given as a security only, and in the nature of a chattel mortgage. There seems to have been a misapprehension by the counsel on both sides in this case as to the effect of the decision of the court in that case. The question arose in a different form in the case of *Shepardson* v. *Cary*, 29 Wis. 34, where the court intimates (although it was clearly not necessary to the decision of that case, as they held that the former judgment was a bar to the latter,) that a warehouse-receipt given by a warehouseman transferred the property, and the implication is, that if it had appeared in the former case that the parties who gave the receipt were regular warehousemen, that the decision would have been different in *Shepardson* v. *Green*. In *Shepardson* v. *Cary* this language is used by the court in referring to *Gibson* v. *Stevens* and *Gibson* v. *Chillicothe Bank*, and to *Rice* v. *Cutler*, 17 Wis. 351: "Such relation, and the consequent rights and obligations of the parties, are held by the decisions just referred to, *even where the sale is made as collateral security for the payment of a debt due from the warehouseman*, not to be affected by the statute regulating the filing of mortgages of personal property, nor by the act concerning warehouse-receipts and bills of lading," which language can hardly be said to be justified, as

we have already seen, either by the case of *Gibson* v. *Stevens*, or by the case of *Gibson* v. *The Chillicothe Bank*. And *Rice* v *Cutler* was, like the others, one of sale, and not of mere security.

There may be some question, perhaps, whether the parties, having relied upon a title under the statute of this state in relation to warehouses, can change their ground and rely upon the efficacy at common law, of the receipts which were given; but waiving that question, there not having been any actual sale of the apples in this case, in order to render the contract valid as to creditors, there must have been a pledge or a mortgage of the property. As already stated, the bank has not proceeded upon the assumption that there was a sale of the property, but only that it had a lien for the money loaned. There was no pledge of the property because the possession was not with the pledgee. Possession actual or constructive is in general indispensable to the validity of a pledge as against creditors. Neither was there any valid mortgage of the property, because there was no possession in the mortgagee, nor was there, in fact, any written mortgage. If the receipts and the circumstances connected with them constituted a mortgage, then it was not recorded, as required, by the statute of Indiana. Under the facts I cannot regard this as anything more than a security, given by the bankrupts to the bank, for the loan that was made. It, therefore, was in the nature of a chattel mortgage, and for the reasons already stated, as such it was invalid, under the statute. Undoubtedly this was a valid contract as between the parties, and it is claimed it was therefore valid as against the creditors of the bankrupts because the assignee, it is insisted, can be in no better position than the bankrupts themselves, he simply being the representative of the bankrupts, and standing as they stood in relation to their rights and equities. But that I do not understand to be the true rule in cases of this kind. The assignee represents all the creditors of the bankrupts. He occupies as such a different position from that of the bankrupts themselves. This has always been the rule established in this circuit, and I think is the better rule. The reasons for it have been given in *In re Gurney*, 7 Biss. 414. They are also stated by Mr. Justice STRONG, in *Miller* v. *Jones*, 15 B. Reg. 150. The same rule is also laid down in the case of *Allen* v. *Massey*, 17 Wall. 351. If it once be admitted that the contract, which is the subject of controversy, is fraudulent as to creditors, then by the express provis-

ion of the Bankrupt Law it is competent for the assignee to attack it, and to cause it to be abrogated for the benefit of creditors. I think that the assignee has the right of a judgment-creditor, where the mortgage or the pledge is invalid in consequence of wanting any element requisite under the law, or under the statute. This is the rule laid down in *In re Gurney*, and also in *Miller* v. *Jones*. In the latter case, while admitting there are decisions to the contrary, STRONG, J., says: "The adjudication of bankruptcy is equivalent to the recovery of a judgment and a levy." It seems to me that any other rule than this would be fatal to the rights of creditors, and would render the Bankrupt Law in one particular almost entirely inoperative.

It is also claimed, on the part of the bank, that the bankrupts received a considerable fund at the time that this contract was made, which went to increase their estate, and, therefore, it not being a security, given for an antecedent indebtedness, but for money actually received at the time, it ought to be held valid. Undoubtedly there are distinctions between a case where an effort is made to secure or pay a precedent debt, and that where money or property is received at the time by the bankrupt as a part of the contract which is the subject of investigation; but that circumstance alone cannot render a contract valid as against creditors, which otherwise is unlawful, because that would enable one creditor to obtain a priority of payment over another; and to hold the contract valid in this case, would give the bank a preference over the general creditors of the bankrupts, which ought not to be allowed unless the contract is in all respects valid. This principle is recognised, and the law as to pledges and the rights of an assignee in bankruptcy, as the representative of the creditors, stated in *Casey* v. *Cavaroc*, 6 Otto 467.

The result is that the decree of the District Court must be reversed, and the bank stand as a common instead of a preferred creditor of the bankrupts' estate.